IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 57 OF 2004

State of Goa,
(Through Public Prosecutor),
Panaji, Goa. ..... Appellant

V e r s u s

Francisco s/o Tony Colaco,
R/o. H. No.257/D,
Near Holy Cross Chapel,
New Vaddem, Vasco
at present lodged in
Central Jail Aguada,
Goa. ..... Respondent/
Accused

Ms. Winnie Coutinho, Public Prosecutor for the State.

Mr. S. G. Bhobe, Advocate for the Respondent/Accused.

CORAM: V. C. DAGA &
N. A. BRITTO, J.J.

DATE: 18th September, 2006.

JUDGMENT (*Per N. A. BRITTO, J.*)

This is State's appeal. Tersely put, by this appeal, the State is

seeking enhancement of conviction from Section 304(ii) to Section 302 I.P.C. and of sentence from seven years R.I. to life imprisonment.

2. The accused was charged and tried, inter alia, for murdering his wife, aged 35 years under Section 302 I.P.C. The accused was also charged under Sections 342 and 504 I.P.C. The learned Sessions Judge, Margao, by his Judgment dated 28.07.2004, has acquitted the accused under Section 504, 302 I.P.C. but convicted and sentenced the accused under Section 304(ii) and 342 I.P.C.

3. The accused and the deceased were both working in MPT (Mormugao Port Trust) and were residing in a one bedroom flat, on the first floor of their house, while the mother of the deceased resided on the ground floor. The accused and the deceased had two children by name Fiona, aged 6, and Favio, aged 4. The prosecution neither alleged nor proved any motive for the crime/s committed by the accused and if the evidence of the mother of the deceased, Ana Flacao/P.w.8 is any indication, it shows that she told the police that the couple was staying happily and were visiting them with their children very often. Indeed, Ana Falcao/P.w.8, also stated that on 01.03.2000, the deceased had visited her at Taleigao, with her two

children on account of the birthday of her husband and went back on the next day. Brazinha/P.w.9, also stated that the deceased was her neighbour for about 5 to 6 years and during the said period, she had not witnessed any incident or a fight or a quarrel between the accused and the deceased. Brazinha/P.w.9, has confirmed that the relationship between the accused and his wife was normal. In other words, there was nothing abnormal about their relationship.

4. The incident culminating into the death of the deceased, as per the prosecution, took place between 07.15 p.m. to 9.00 p.m. on 07.03.2000. However, if the scenario is reconstructed, it shows that the so called quarrel between the husband and wife had started much earlier. As per Santan Correira/P.w.1, when he reached there, at about 7.00 to 7.15 p.m., there were already about 10 to 12 policemen including Officers present. Anthony/P.w.11 stated that at about 6.00 p.m., when he was near the Sunrise Bar and was talking to his friends, he heard the sound of shouting towards Holy Cross Chapel, near the house of the accused, and at that time, he saw the accused on the first floor of his house near a window and according to him it was the beginning of the incident which continued for about three hours or so. However, the facts on record show that

Anthony/P.w.11, might have reached there much later. As per Jude/P.w.2, some people who were present had stated that the incident had started at 3.40 p.m. and others stated that it had started at 5.30 p.m. The I.O. Shri Banaulikar/P.w.18, was informed about the incident, as stated by him, at about 7.30 p.m. and he reached the scene at about 8.00 p.m. and this has been confirmed by Anthony/P.w.11, when he stated that PI Banaulikar/P.w.18, came to the spot at 8.00 p.m., and it appears that till about 9.00 p.m., no effort was made by the police to stop the assault on the deceased. The flat of the accused/deceased was broken open at about 9.00 p.m. and this timing appears to be correct since the deceased was taken to Cottage Hospital at Chicalim and was examined there at 9.15 p.m. Even prior to the arrival of Shri Banaulikar/P.w.18, PSI Corte/P.w.15 and PSI Bhanudas Dessai/P.w.16 had reached the scene after they got the information at about 7.20 p.m. Anthony/P.w.11 stated that when he saw the accused at about 6.00 p.m., on the first floor of his house, he asked him as to why there was noise and the accused started giving him bad words and he too abused the accused and within two seconds or so, the accused brought two or three soda bottles and threw the same on him which fell and broke near his legs. He also stated that the mother of the accused was inside the house and he met her and asked her as to what was the problem

and the mother of the accused told him that the accused had taken his wife on the first floor and was assaulting her and that she was hearing the noise. Apparently, the mother of the accused was not examined and it does not appear that she also took any steps to go up on the first floor to prevail upon the accused not to assault the deceased in case she knew that the accused was assaulting the deceased. Anthony/P.w.11 further stated that he knocked at the door which was latched from inside and the accused opened the door partly without removing the chain and after seeing him, the accused stated that he would show him and came with a 'koita' and he came down to the ground and removed a danda with the intention of going again to the first floor to sort out the problem, but by that time, the persons in the crowd increased and he was advised not to interfere as police were likely to arrive at the spot. He stated that the police came to the spot at about 6.45 p.m. and the accused had continued assaulting his wife and he had seen the accused keeping the 'koita' near the neck of his wife and threatened them to go away stating that in case they did not go away, he would kill his wife. He also stated that more police force arrived at the spot along with fire brigade, and thereafter, the police forcibly broke opened the door of the flat. The version of Anthony/P.w.11 has not been supported by Santan Correia/P.w.1, who was present there from 07.00 p.m.

Anthony/P.w.11 might have reached there only around that time and not at 6.00 p.m. as stated by him.

5. There appears to be an element of exaggeration in the versions given by different witnesses, who have given different versions. Santan Correira/P.w.1 has stated that he was told by the people that there was a quarrel between the husband and the wife and when he went close to the building, he found that the shouts were of the accused and the deceased. He stated that he climbed the neighbouring building and peeped from the window and saw the accused and the deceased were quarreling and though there was no light at that time, he could see the accused was beating the deceased with a 'koita'. One fails to understand as to how Santan Correira/P.w.1 could have seen the accused beating his wife with a 'koita' when there were no lights not only in the flat of the accused but in the entire area and that too from a neighbouring building which otherwise has not been shown either on the photographs or the sketch prepared. If Santan Correira/P.w.1 had to go to the neighbouring building to see what was going on in the flat of the accused, Mahadev Nanuskar/P.w.14, has stated that he had climbed the balcony on the first floor and he had caught hold of the hand of the accused through the grills of the window, but not a

single witness has supported his version. It appears that the decision to break open the flat was taken at the insistence of Santan Correira/P.w.1 and Jude Coutinho/P.w.2 when Banaulikar/P.w.18 was questioned as to what he was doing when the accused was assaulting his wife. In other words, if the police wanted to stop the assault, they could have done so much earlier, and saved the deceased. PSI Corte/P.w.15, claims that he could see the accused through the window and he saw the accused holding a female with a 'koita' with his hands placed on her neck. Likewise, the I.O. Shri Banaulikar/P.w.18, has also stated that he saw the accused holding the 'koita' on the neck of his wife but as per PSI Bhanudas Dessai/P.w.16, the accused was catching hold of his wife by catching knife in his hand. Two of the prosecution witnesses namely Santan Correira/P.w.1 as well as Jude Coutinho/P.w.2 have clearly stated that there was no light in the house of the accused. Across the drawing room, there is the balcony and down below was the road and, therefore, in the absence of any lights being there in the said flat, and in the area around it, it is difficult to accept the version given by the aforesaid witnesses whether they had at all seen the accused holding a 'koita' or knife across the neck of the deceased. The explanation given by Shri Banaulikar/P.w.18, for not taking prompt action to stop the assault by the accused upon the deceased is that he did not find it necessary

to break open the door immediately as the accused was holding his wife and giving threats and he had repeatedly requested the accused to open the door. Certainly, that could not have been the conduct of a responsible Officer like Shri Banaulikar/P.w.18, in case he had really seen the accused keeping the 'koita' on the neck of his wife.

6. However, the fact remains that when the door of the flat was broken open, both the accused and the deceased were found in naked condition and the deceased was lying on the floor with several injuries on her body and the accused was standing besides her, also with some injuries. As per Jude Coutinho/P.w.2, when the door was broken open, the accused threw one bottle which hit Mohandas/P.w.12. Jude Coutinho/P.w.2, is the only witness, who has stated that he saw the accused, after the door was broken open, with a 'koita' in one hand and a bottle in another.

7. After the flat was broken open, the accused and the deceased were taken to the Cottage Hospital at Chicalim, where they were examined by Dr. Nadkarni/P.w.17. As per Dr. Nadkarni/P.w.17, when the deceased was brought at about 9.15 p.m., she was drowsy but not fully conscious but was in serious condition. According to him, the history of the injuries given

of the deceased was of assault with soda bottles and other objects all over the body. Any reference to a 'koita' or a knife was absent in the said history; and, as per Shri Banaulikar/P.w.18, when he had received the phone call, the information was that one person had bolted the door of his flat from inside and pelting soda filled bottles on the road and was also hitting his wife. Dr. Nadkarni/P.w.17 stated that the deceased was therefore given emergency treatment and sent to Goa Medical College Hospital, but she breathed her last before reaching there at 22.07 hours. Dr. Nadkarni/P.w.17, who examined the accused at 9.15 p.m., at the Cottage Hospital, Chicalim, found the following injuries on the accused:

1. C.L.W. 5 x 3 cms on inner aspect of the right hand caused by sharp object, less than 6 hours duration.
2. C.L.W. 3 x 2 cms below left elbow posteriorly.
3. Abrasions 2 in number 3 x 1 cm on right knee;
4. Multiple abrasions varying in size on right forearm lateral aspect;
5. Multiple C.L.Ws 2 x 1 cm on fingers of right hand. All these injuries were caused by sharp object, less than six hours in duration.

6. Abrasion 2 x 1 cm on left knee.
7. Bruise 7 x 4 cm on right chest posteriorly. These two injuries were caused by blunt object, less than six hours in duration.

8. The autopsy of the deceased was conducted by Dr. Rodrigues/P.w.10, who found on the deceased the following injuries:

1. Incised wound of 3x 0.5 x skull bone deep. Obliquely placed in right posterior parietal scalp region, 1 cm mid line.
2. Incised penetrating wound of 1.5 x 0.8 x bone deep, in temporal region of scalp, 2 cm above upper insertion of left ear. Margins irregular and abraded. It has chipped the temporal bone by 0.8 x 0.5 cm from the dura and entered the temporal lobe of brown to a depth of 0.8 cms placed horizontally.
3. Incised penetrating wound of 1.5 x 0.8 cm x bone deep, 2.5 cms above injury no.2, Margins irregular and abraded. It has chipped the temporal bone by 0.8 x 0.5 cm, torn the dura and entered the temporal lobe of brain to a depth of 0.7 cms., placed horizontally.

4. Incised penetrating wound of 1.5 cm x 0.8 x bone deep, 2 cm behind injury no.2. Margins irregular and abraded. It has chipped the temporal bone by 0.8 x 0.5 cm, torn the dura entered the temporal lobe of brain to a depth of 0.7 cm, placed horizontally.
5. Vertical scratch of 20 cm, mid outer aspect of right arm in upper 2/3 region.
6. Vertical scratch of 6 cm on top of right shoulder outer aspect.
7. Bruise, fresh, reddish of 20 x 6 cm, upper outer 2/3rd of the right arm.
8. Superficial incised cut of 2 cm x 2 mm, upper third front of left arm with tailing outwards.
9. Bruise, fresh, reddish 14 x 5 cm over middle outer aspect of left arm.
10. 13 superficial skin deep to subcutaneous tissue deep cuts varying in length from 0.5 to 1.5 cm and width of 2 to 5 mm present on left side lateral abdominal wall in an area of 25 x 15 cms.
11. 2 horizontal incised cuts of 1 x 0.5 x SCT deep, present on left side umbilical region, 2 cms below umbilicus, one cm

from mid line and another 3 cms below previous injury.

12.3 horizontal placed incised cuts 0.5 x 2 mm each on right side middle front of neck.

13.3 horizontally placed incised cuts of 1 x 0.5 cm, one cm above right mid clavicle, 0.5 x 0.5 in between left and right clavicle.

14. 4 superficial incised cuts, sub cutaneous tissue deep of 2 x 0.5 cm, vertical over left mastoid region, another of 2 x 0.5 cm, 3 cms below previous injury, 1.5 x 0.5 cm, 3 cms medial to previous injury and another of 1 x 0.5 cm, 3 cm below previous injury on left side of neck.

15. 4 superficial incised cuts of 2 x 0.5 cm, vertically placed over left anterior axillary fold, another of 1.5 x 0.5 mm just below medial end of left clavicle, another of 1 x 0.5 cm just below mastoid end of right clavicle and another 1 x 0.5 cm, medial to right anterior axillary fold in upper right and left sides of front of chest respectively.

16.Horizontal incised cut of 1.5 cm x 3 mm in right side lower medial front of chest, SCT deep.

17.3 horizontal incised cuts of 0.5 x 0.5 cm, 1.5 x 0.5 cm and 1

x 0.5 cm in upper front of right thigh, one below the other, SCT deep.

18. 2 horizontal incised cuts of 1 cm x 2 mm, 1.5 x 0.5 cm in upper third front of left thigh one below other and one vertical cut of 2 x 0.5 cm in middle front of left thigh SCT deep.

19.Vertically oblique scratches, five in number of 7 to 10 cm length in middle and lower third front of right thigh.

20.Incised wound of 1 x 0.5 cm, outer aspect of right knee and another of 1.5 x 0.5 cm. Lower front of left leg.

21. 3 incised cuts of 1 x 0.5 cm , on left, 1 x 0.5 cm, mid right and 0.5 x 0.5 cm on outer right side of pubic region, SCT deep.

22. 2 horizontal scratches of 5 and 7 cm, lower outer aspect of left thigh.

23.Bruise, fresh, reddish of 12 x 8 cm, mid outer aspect of right thigh and 6 x 4 cm over upper outer aspect of right leg.

24. 2 incised cuts of 0.5 cm x 0.5 cm, over right breast, 4 cm above right nipple and another on left breast of 1 x 0.5 cm, on upper outer aspect.

25. 40 horizontal incised penetrating wounds present in middle and right side back of abdomen, varying in length from 1.5 to 3.5 cm and width of 2 mm to 5 mm. These wounds have penetrated the posterior surface of right lobe of liver at multiple places to a depth of 1.5 to 3.5 in the substance of liver. Peritoneal cavity contains 1.8 litre of fluid blood. The duration is from backwards to forwards and inwards.

9. As per Dr. Rodrigues/P.w.10, the death was due to haemorrhage and shock as a result of penetrating wounds to abdomen and head consequent to sharp pointed penetrating cutting weapon which were necessarily fatal. However, Dr. Rodrigues/P.w.10, has stated in cross examination that the injuries noted by him were not fatal individually. Dr. Rodrigues/P.w.10 also opined that looking at the nature of the injuries and loss of blood, the patient would have died within three hours. He also opined that there were no ligature marks on the person of the deceased, thereby showing that the statements made by some of the witnesses that the deceased was found tied, was not free from doubt. As far as injuries nos. 2 to 4 are concerned and which were incised penetrating wounds of the same dimensions, Dr. Rodrigues/P.w.10 opined that the same could be caused by

'koita'/M.O.8 whilst the other injuries could have been caused by the small knife/M.O.5, both of which were found in the flat of the accused. At the same time, Dr. Rodrigues/P.w.10, stated that the end of the 'koita'/M.O.8 was slightly blunt and it's curved portion at the end was about ½ inch and the thickness at that point was about 2 mm. With reference to the said 'koita'/M.O.8, Dr. Nadkarni/P.w.17 stated that the tip of the 'koita' was not very sharp and with it, no stab injury was possible. In the light of that opinion, it will be difficult to accept whether injuries nos. 2 to 4, which were incised penetrating wounds could have been caused by the said 'koita' or by some other weapon.

10. Nevertheless, the fact remains that when the flat was broken open, the deceased was found lying in a pool of blood and the accused standing near about her. There is no doubt that the burden of proof is on the prosecution to prove its case beyond reasonable doubt but when certain things are exclusively to the personal knowledge of the accused, it is only the accused who could have explained the same, in terms of Section 106 of the Indian Evidence Act. The accused provided no explanation as regards the injuries on him as well as on the deceased and the only inference which could be drawn was that the accused was the author of the injuries found

on the person of the deceased. All that the accused stated when he was examined under Section 313 of the Code, was that he did not kill his wife and that he came to his senses only when the Doctor was suturing his injuries and on the next day he came to know that his wife had expired, an explanation, which was not at all acceptable. As observed by the Apex Court in the case of ***Balram Prasad Agarwal v. State of Bihar (1997(1) Crimes (SC) 10),*** the facts which are in the personal knowledge of the accused have got to be explained by the accused to disprove the prosecution case and this burden of Section 106 of the Indian Evidence Act, has got to be discharged by the accused, which has not at all been done in this case.

11. The above is one part of the story of the prosecution and, in that background, Ms. Coutinho, the learned Public Prosecutor, on behalf of the State, has submitted that the murder of the deceased was preplanned, brutal and was executed in a diabolical manner. She further submitted that the fact that the accused tortured the deceased for about three hours is consistent with the intention to kill. Learned Public Prosecutor further submitted that the case at hand is covered by Clause 2 and 3 of Section 300 of I.P.C. and has placed reliance on the cases reported in ***AIR 1984 Cr. L.J. 1014, 1991 Cr.L.J. 1373, 1996 Cri L.J. 399, 2004 Cr.L.J. 1373, AIR***

1928, (10) Lahore 555, 2004 SCW AIR 24, and ***AIR 2006 Bombay 147.***

On the other hand, it has been submitted by Shri Bhobe, the learned Counsel appearing on behalf of the accused, that there was no single injury found on the deceased from which it could be concluded that the accused intended to cause the death of the deceased. Shri Bhobe further submitted that if the deceased ultimately died, she died due to loss of blood as a result of many injuries found on her and in case, the police had intervened in time, then her life could have been saved. Shri Bhobe has further submitted that it is not the case of the prosecution that any single injury was also sufficient to cause the death of the deceased and that improvements had been made by the police in order to cover up their inaction. Shri Bhobe further submitted that even if the deceased was attended at the Cottage Hospital with necessary medical treatment, she might have not breathed her last and the facts show that she died on the way to Goa Medical College. Shri Bhobe has also submitted that the prosecution also did not prove any motive and, therefore, it is difficult to accept that the accused wanted to murder the deceased. It is his submission that in such a situation, there is no scope for enhancing either the conviction or the sentence.

12. It is not necessary for us to refer to all those cases cited on behalf of the State. In the case of ***State of Rajasthan v. Dhool Singh (2004 AIR SCW 24),*** the Apex Court has stated that the number of injuries is not always the determining factor in ascertaining the intention of causing death. The number of injuries is irrelevant. It is the nature of the injury, the part of the body where it is caused, the weapon used in causing such injury which are the indicators of the fact whether the accused caused the death of the deceased with an intention of causing death or not. In the case of ***State of U.P. v. Virendra Prasad (2004 Cri. L.J. 1373)***, the Apex Court observed that the academic distinction between murder and culpable homicide not amounting to murder has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. Thereafter the Apex Court drew up a comparative table, with the words of both the said Sections and referred to the case of ***Virsa Singh v. State of Punjab (AIR 1958 SC 465)***, with reference to Clause “thirdly” of Section

300 and observed that under Clause “thirdly” of Section 300 I.P.C., culpable homicide is murder if both the following conditions are satisfied i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which in the ordinary course of nature was sufficient to cause death, i.e. that the injury found to be present was the injury that was intended to be inflicted and that according to the rule laid down in ***Virsa Singh's*** case (supra), even if the intention of the accused was limited to the infliction of the bodily injury sufficient to cause death in the ordinary course of nature and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.

13. It is now well settled that it is the nature of the injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances which the injury caused and the manner in which the injury is inflicted are all relevant factors which go to determine the required intention or knowledge of the offender and the offence committed by him.

14. There is another side of the story of the prosecution which remains unexplained and on which the learned Public Prosecutor has not been able to throw any light whatsoever. If the accused intended to murder the deceased, the accused would not have phoned his mother in law Ana/P.w.8 and told her to bring one ghadi (local exorcist), to remove the devil and then hand over the phone to the deceased to speak to her mother. When the accused told that to his mother in law Ana/P.w.8, the latter asked him as to why she should bring a '*ghadi*' to remove the devil and that the accused should believe in Jesus. Who did the accused think was possessed by Devil to tell his mother in law to bring an exorcist? The statement by the deceased to her mother Ana/P.w.8 that the former had told the latter that the accused was going to kill her, has been proved to be an improvement in the version of Ana/P.w.8. A person intending to murder the deceased would have certainly not phoned the mother in law Ana/P.w.8 and told her to come with a '*ghadi*'. This was at about 7.00 p.m. or so. The deceased then phoned Brazinha/P.w.9, at about 8.30 p.m., and at that time, Brazinha/P.w.9, heard the deceased saying "*In the name of Jesus I rebuke thee satan*". Who did the deceased think was possessed by the Devil? Brazinha/P.w.9 also stated that the deceased told her on phone that she

should request the crowd to go away and she saw a policeman outside the house of the accused and told the said policeman to request the crowd to go away. She also stated that the deceased did not tell her on phone the reason why the crowd should go away. Santan Correira/P.w.1 and Jude Coutinho/P.w.2, have also stated that the deceased was shouting to the people to go away by saying "*vosai vosai*" (go, go). In fact Jude Coutinho/P.w.2 stated that he saw the deceased shouting from the top of her voice for the people to go away. Constable Gaonkar/P.w.7, also stated that the lady was telling them to disperse from the spot or else the person would kill her but it has again been proved that the later part of his said statement was nothing but an improvement. One fails to understand as to why the deceased, if at all she was being assaulted by the accused, would have told the crowd to go away. In fact she should have shouted for help to free herself from the accused. There is also evidence on record to show that there was fire and smoke in the flat and not only that, when the flat was broken open, both the accused and the deceased were found in naked condition. Fire and smoke are always associated with religious practices. Mohandas Nair/P.w.12, Constable Nanuskar/P.w.14, PSI Corte/P.w.15 as well as PSI Dessai/P.w.16, have all stated with unanimity that during the time of the incident, the wife of the accused as well as the accused were

singing prayers and it has also been stated by PSI Dessai/P.w.16 that the accused was also shouting and telling the policemen as well as the public members to go away from the site. All these facts indicate that something bizarre or occult was going on between the accused and the deceased in the said flat during the time of the incident whether it started at 3.40 or 5.30 or 7.00 p.m., and in that process, injuries were caused to the deceased by the accused due to which the deceased ultimately died, due to loss of blood.

15. As already stated, Dr. Rodrigues/P.w.10 has stated that the injuries described by him were not individually fatal. In other words, Dr. Rodrigues has also not stated that any of the injuries were sufficient to cause death in the ordinary course of nature. If at all the accused wanted to murder the deceased, he would not have gone in the manner he did for such a long time for it was possible for him with the “koita” which he had, to inflict a deadly injury and finish with the deceased once for all. It also cannot be said that any single injury was inflicted by the accused knowing to be likely to cause death of the deceased. It also cannot be said that any injury was inflicted by the accused with the intention of causing bodily injury to the deceased and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. In our view, the

prosecution has failed to bring sufficient material on record to prove that the case was covered by either of the first three clauses of Section 300 of I.P.C. The Apex Court in the case of ***Willie Slaney v. State of Madhya Pradesh (AIR 1956 S.C. 116)***, has stated that where the accused causing the death of another had no intention to kill, then the offence would be murder only if, (1) that the accused knew that the injury inflicted would be likely to cause death, or (2) that it would be sufficient in the ordinary course of nature to cause death or (3) that the accused knew that the act must in all probability could cause death and if the case cannot be placed as high as that and the act is only likely to cause death and there is no special knowledge, the offence comes under Section 304(ii) of I.P.C. In the case of ***Haku v. Emperor (AIR 1928 Lahore 917)***, it was held that where the accused inflicted many blows on the body of the deceased and also gave kicks in order to drive away evil spirit and thereby caused the death, the accused was to be held guilty under Section 304 (ii) I.P.C. The case at hand appears to be quite close to the aforesaid case.

16. The burden is always on the prosecution to prove affirmatively that the offence is one of murder. In view of the unexplained circumstances discussed herein above, we are inclined not to come to that conclusion. We

are therefore of the view that no case is made out either for enhancement of conviction or of sentence. Consequently, we hereby dismiss the appeal with no order as to costs.

V. C. DAGA, J.

N. A. BRITTO, J.

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